SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1968.

No. 44

(Formerly No. 1210, October Term, 1967.)

WILLIAM SKINNER, AUGUST R. GUELDNER and ALTON J. CHARBONNET,

Petitioners,

versus

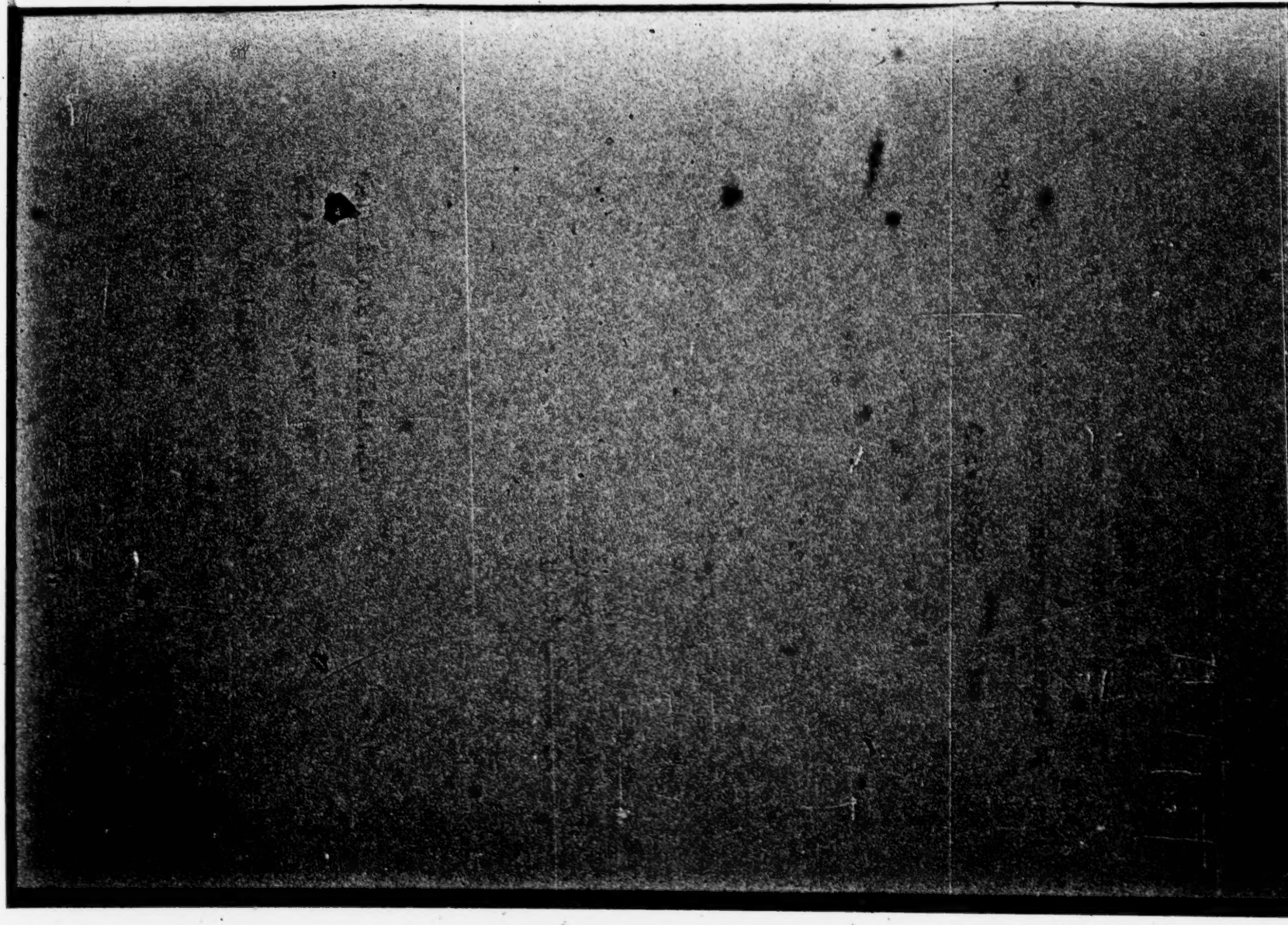
STATE OF LOUISIANA,

Respondent.

On Certiorari to the Supreme Court of Louisiana To Review Proceedings of that Court in No. 48,445, "State of Louisiana vs. William Skinner, et al.".

ORIGINAL BRIEF ON BEHALF OF PETITIONERS.

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OPINION BELOW.

The opinion below is reported in 204 So.2d 370. The Supreme Court of Louisiana had, on original hearing, reversed the conviction and sentence. On rehearing, the sentence and conviction were affirmed by a vote of 6 to 1. Both opinions are reported in 204 So. 2d, commencing at page 370. The final opinion was reproduced in Appendix A of the application for certiorari herein and the original opinion is reproduced in a Supplemental Appendix, filed under separate cover with this brief by orders of the Clerk of this Honorable Court.

JURISDICTIONAL STATEMENT.

On rehearing before the State Supreme Court, the original reversal of the conviction and sentence was recalled and, by judgment entered November 6, 1967, the State Supreme Court affirmed the conviction and sentence of your petitioners. Application for a second rehearing was denied on December 11, 1967 and timely application for certiorari was made to this Court. Certiorari was granted by this Court on the 3rd day of June, 1968.

Jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1257 (3) and the rules of this Court.

STATUTES INVOLVED.

The right to confrontation of an accused by witnesses against him is set forth in Article I, Sec. 9, of the Louisiana Constitution of 1921, in the following language:

> "The accused in every instance shall have the right to be confronted with the witnesses against him, etc."

The procedure sanctioned in the instant case is measured against the Federally guaranteed rights to confrontation and due process contained in the Sixth and Fourteenth Amendments to the Constitution of the United States.

QUESTIONS PRESENTED.

1. Were the constitutional rights of petitioners to due process and confrontation by witnesses, guaranteed under both State and Federal Constitutions, violated by reason of the fact that, during hearing on certain vital pre-trial motions, one defendant was neither present nor represented by counsel?

2. Were the constitutional rights of defendant and petitioner Charbonnet violated by reason of the fact that he was arraigned, without counsel, in a felony case in which he was later to be sentenced to fifty years in the penitentiary?

3. Were the constitutional rights of all the petitioners to due process denied by reason of the all night session conducted, the illness of counsel and the fact that the jury was so exhausted that two of the jurors were apparently asleep during a critical phase of the case?

4. Were petitioners denied due process by reason of the defective charge relating to conspiracy?

STATEMENT.

Although this application for certiorari is limited to the four questions above presented, in order to appreciate the full impact of the above errors, it is necessary to note at the outset:

(a) That your petitioner William Skinner was neither a user nor a "pusher" of narcotics, but a reputable and successful business man in New Orleans who operated two rather large second hand automobile sales outlets under the name of "Skinner's Automart." He became a target of the undercover narcotic agents *only after they had failed to put together a charge against one of his employees.* (Vol. 1, R. 52, 53.) As the record will clearly show, he was entrapped by State narcotics agents, acting under a "front" consisting of an auto finance agency which was vital to the operation of Skinner's automobile business. The vicious tactics employed to pressure Skinner into a purely technical "possession" of marijuana stand forth clearly, as noted below;

(b) That, as to petitioner Charbonnet, sentenced to fifty years in the penitentiary, the trial Judge created the novel theory that, because he had not filed or joined in certain preliminary motions, said motions could be tried and disposed of without even notifying him of said hearings. Thus, despite the fact that issues vital to him were being tried, this indigent negro was allowed to languish in jail, while his fate was being decided in the Courtroom.

Your petitioner Alton J. Charbonnet, a 33 year old negro, was charged jointly with petitioners Skinner and Gueldner in an information charging two counts relative to marijuana: sale and possession. At the time of trial there was also pending against all three

petitioners a charge of conspiracy relative to the same naroctics transaction but said case was not tried or in any way consolidated with the instant case. Nevertheless, as noted below, the trial judge evidently confused the instant case with the conspiracy case. This is indicated by the fact, as noted hereafter, that he referred to the instant case, during trial of a preliminary motion, as one involving conspiracy (Vol. 1, R. 64) and he finally gave a full blown charge on conspiracy, though none was charged.

Such confusion during the trial, and during handling of preliminary motions, is further indicated by the failure to have defendant (petitioner) Charbonnet even present in Court during the trial of certain motions vitally affecting his case.

Your petitioner William Skinner was a fairly prosperous dealer in second hand automobiles with two outlets for retail sales in New Orleans. Gueldner was his employee who assisted in sales and was generally active in the business. State undercover narcotic agents were first seeking to make a case against another employee, not here involved and, for that purpose, they infiltrated Skinner's automobile business by virtue of automobile loans which one agent controlled through a "front" as manager of a financing agency. (Vol. 2, R. 680.) It was admitted by the undercover agent that Skinner himself had not been a suspect but that the investigation had been initiated against one of his employees who was never charged. (Vol. 1, R. 52, 53.)

Using his leverage as manager of the finance company, vital to Skinner's business, this agent in disguise first began to probe his influence on Skinner by first getting the latter to loan or give him money for betting at the race track. (Vol. 2, R. 456.) Later, the same agent, probing still further the extent of his influence upon Skinner, persuaded the latter to obtain dates with women for him. Finally, having found Skinner willing and eager to please, the State contends that the agent got Skinner to put him into contact with Charbonnet for the purpose of obtaining some marijuana. (Vol. 2, R. 420.)

The information charged a single transaction on May 21, 1965.

ARGUMENT.

The Absence Of Defendant Charbonnet During Crucial Pre-Trial Motions, Lack Of Representation And Even Of Notice Of Said Evidentiary Hearings.

Bill of Exceptions No. 35 (Vol. 2, R. 388) relates to the denial of a motion for new trial because defendant Charbonnet, although a co-defendant, was neither present nor represented by counsel during the hearing of certain important preliminary motions vitally affecting his case.

The minute entries in this case reflect that on August 26, 1965 all three defendants were arraigned together and all pleaded not guilty. (Vol. 1, R. 1.) (The date "Aug. 26, 1966" here is an obvious clerical

error.) The same entry notes that defendants Skinner and Gueldner were given ten days in which to file technical pleadings and defendant Charbonnet was given the *same delay to determine counsel. Thus, he was not even represented by counsel at his initial arraignment.*

Charbonnet, an indigent negro, was at first unable to obtain counsel and an additional delay was granted. On Sept. 20, 1965 the Court appointed Mr. Monie as counsel for Charbonnet. (Vol. 1, R. 2.)

On Sept. 21, 1965, Mr. Gill, as counsel for Skinner and Gueldner filed a motion for bill of particulars, motion for preliminary examination, a motion to quash and a motion to quash the search warrant. (Vol. 1, R. 2.)

The case did not go to trial until the following year, on March 21, 1966. Meanwhile defendant Charbonnet was supposedly represented by a succession of Court appointed counsel, one of whom died. (Vol. 1, R. 4.) During this lengthy period in which Charbonnet was nominally represented by Court appointed counsel:

(a) He was never present at the trial of the many motions noted above, vitally affecting his case;

(b) The minutes fail to reflect that he was ever represented by counsel at the trial of these important motions; and

(c) He was never even notified of the trial of these motions, his counsel were never so notified and Charbonnet himself languished in jail during this period, being unable to make bail.

The motions for a bill of particulars, plea of entrapment and motion to quash were heard, evidence taken and disposed of on September 28, 1965. (Vol. 1, R. 3.)

On Oct. 8, 1965 the minutes reflect that the motion for preliminary hearing was disposed of (Vol. 1, R. 4) and it was in this connection that the Court, in holding that a prima facie case had been made out so as to *hold the three defendants for trial,* held that a case for conspiracy had been made, *despite the fact that conspiracy was not charged in the instant case.* Reference to a conspiracy, therefore, could only have related to a separate pending case. Significantly however, on this, as on the hearing of other motions noted above, the Court was making rulings which had a direct and vital bearing upon defendant Charbonnet, who was neither present nor represented during the extensive trial of such motions and who was not even notified that they were being held.

It was not until Jan. 18, 1966 that defendant was able to obtain employed counsel, Mr. Link. (Vol. 1, R. 5.) Said counsel immediately proceeded to request copies of the transcript of the proceedings in the many motions noted above and this request was granted. (Vol. 1, R. 5.)

The extensive testimony taken in connection with the above motions, including the preliminary examination and motion to suppress covered some 47 pages of testimony. (The transcript of this testimony, through clerical oversight, appears in reverse order. The testimony in connection with the Oct. 8, hearing commences at page 41 of Vol. 1 and that in connection with the Sept. 28 hearing commences at page 73 of the same volume.)

During the trial of two of these jointly heard motions, in which extensive testimony was heard, the trial Judge expressly noted the absence of defendant Charbonnet: (Vol. 1, R. 80)

BY THE COURT: "*** In the second count they are charged with—*three people are charged here*—Mr. Charbonnet, BUT HE'S NOT HERE BECAUSE HE NEVER ASKED FOR THIS HEARING—did wilfully *** etc." (Emphasis added.)

The failure of the Court to have defendant Charbonnet present at hearing of these vital motions, particularly during the preliminary hearing, was doubly prejudicial: First, it prejudiced the rights of defendants Skinner and Gueldner by depriving them of the benefit of having Charbonnet being present to hear what was being said by the State witnesses, particularly during the preliminary examination. Secondly, it prevented Charbonnet being on hand so as to hear what was being said against him at a time

when he or his counsel could do something about it, i.e., exploit any "breaks" in the case.

This highly unusual procedure of attempting to try "piecemeal" *a case tightly involving three defendants, leaving one out altogether,* was in direct violation of State constitutional safeguards, discussed below, and violative of the rights of all defendants to due process under the due process clause of the 14th Amendment to the Constitution of the United States.

The prejudicial effect of this "piecemeal" procedure, quo ad ALL DEFENDANTS is pointed up by the fact that, at one stage in the taking of testimony during said pre-trial hearings, THE STATE HAD PUT FORTH ERRONEOUS EVIDENCE AS TO THE IDENTITY OF THE UNDERCOVER AGENT INVOLVED IN A MOST VITAL PART OF THE CASE. AGENT HEBERT WAS CONFUSED WITH AGENT FULLINGTON. (Vol. 1, R. 6.) This error was committed before Mr. Link ever got into the case. Thus, when Mr. Link, as counsel for Charbonnet, later requested and obtained a copy of the transcript of the proceedings of the pre-trial motions to quash, for preliminary hearing, etc., it appeared that the State was on the verge of going to trial with a highly defective bundle of proof, one which could possibly be blown high when it developed that the State had the wrong agent identified in a major phase of its proof. In this context, therefore, it seemed highly inadvisable for Mr. Link to request that the pre-trial evidence be rehashed by a second hearing, because

this would be merely an invitation to allow the State to find out what its case was all about and to straighten out its proof in apple pie order. Thus, there was certainly no lack of diligence on the part of Charbonnet's employed counsel. In retrospect, what he did seems entirely proper. He must have realized that the transcript of the hearings revealed a major defect in the State's case, one which might be exploited at trial if uncorrected. Moreover, in view of the fact that, under Louisiana law the grant of a preliminary hearing, after indictment, is purely discretionary, there was little likelihood that the trial Judge would have granted him a preliminary hearing for Charbonnet virtually on the eve of trial. So, counsel for Charbonnet, Mr. Link, decided to sit tight and let the State try to make out the best it could with its mixed-up identity situation.

AT THIS POINT THE PLOT THICKENS: ABOUT A WEEK BEFORE TRIAL THE STATE DISCOVERED ITS ERROR AS TO THE CONFUSION BETWEEN AGENT HEBERT AND AGENT FULLINGTON AND AMENDED THE INFORMATION TO SHOW THE CORRECT NAMES. (Vol. 1, R. 6.) THE OTHER DEFENDANTS WERE THEN FACED WITH A LAST MINUTE CHANGE IN IMPORTANT FACETS OF THE STATE'S CASE. THIS, OF ITSELF, WAS BOUND TO BE SOMEWHAT PREJUDICIAL. BUT THE MAIN ASPECT OF PREJUDICE, *AFFECTING ALL DEFENDANTS,* WAS THE FACT THAT, WHEN THE TESTIMONY WAS GIVEN WHEREIN THE NAMES OF THE TWO

AGENTS WERE CONFUSED, CHARBONNET WAS NEITHER PRESENT NOR REPRESENTED. IT MAY WELL BE THAT, HAD HE BEEN PRESENT OR REPRESENTED THE ENTIRE DEFENSE MIGHT HAVE SO CAPITALIZED ON THIS GRIEVOUS ERROR THAT THE COURT WOULD HAVE DISMISSED THE CASE ON THE PRELIMINARY HEARING.

Under Louisiana law, the main purpose of a preliminary hearing is to determine whether or not there is sufficient evidence to hold a defendant for trial. It might well have developed, therefore, that, with such major confusion in the wind, the trial Judge would have directed the State to back out and come back into Court with a decently prepared package of proof. As noted elsewhere, there was pending another separate case against all three defendants, one involving conspiracy. In fact, as noted in another connection, the Court himself confused the conspiracy case with the case at bar when he gave his charge to the jury. The giving of this full blown conspiracy charge, when no conspiracy was charged, was the sole basis of the initial reversal by the State Supreme Court.

It is, perhaps idle to speculate what might have happened had the trial Judge required this case to be tried in conventional manner, rather than in the "fractional" sort of hearing permitted here, one in which the indigent Charbonnet was kept locked up and uninformed as to what was going on until the last

minute. The simple fact is that this "piecemeal" procedure, in which Charbonnet was prevented from taking part in proceedings vitally affecting him, is simply monstrous. It is a worse sample of a Star Chamber proceeding than ever saw the light of day when Henry the Eighth trod the boards and Good Queen Elizabeth played footsie with Essex, et al.

The rationale of the State Supreme Court in giving its blessing to this bizarre procedure is contained in one paragraph, which is reproduced at page 57 of the Appendix with our petition for certiorari. Because this treatment presents a mystery as deep as the disappearance of Justice Crater, we repeat it here. In disposing of this most serious issue the following is all that the Supreme Court of Louisiana had to say:

"It is true that the minutes of court must show that the accused was present at every important stage of the trial for a felony from the moment of his arraignment to his sentence, *State v. Pepper,* 189 La. 795, 180 So. 640; *State v. Breedlove,* 199 La. 965, 7 So.2d 221, but, as stated *supra,* defendant Charbonnet pleaded "Not Guilty," and was thereafter represented by counsel. His counsel did not file a Motion to Suppress. Under such circumstances, we conclude that it was not imperative that he be present at the trial of the Motion to Suppress and Dismiss filed by defendants Skinner and Gueldner. Charbonnet suffered neither prejudice nor violation of his constitutional rights."

The statement by the State Supreme Court that, after pleading not guilty, Charbonnet, was "thereafter represented by counsel" is simply a batch of weasel words which scurry away from the simple truth that none of Charbonnet's numerous counsel lifted a finger to help him until Mr. Link got into the case. *This was even admitted by the State in its brief.*

In brushing aside these grievous procedural irregularities as to complete lack of representation and absence from vital portions of the trial, the State Supreme Court makes no attempt to reconcile what was done here with either State or Federal jurisprudence or constitutional safeguards.

The basic right to confrontation, provided by Article 1, Sec. 9, of the Constitution of Louisiana, is not even mentoned. Nor does the Court deign to discuss its own leading case of *State v. Pope,* 39 So.2d 719, 214 La. 1026 (1949) wherein the Supreme Court of Louisiana, with Justice Hamiter as organ (the lone dissenter here) declared:

"The jurisprudence of this state is to the effect that one tried for a felony must be personally present in court *at every important stage of the trial from the moment of the arraignment to his sentence, otherwise a verdict against him will be set aside.* (Emphasis added—Citing numerous Louisiana cases.)

The above statement of the rule, likewise under different facts, was approved by said Court as recent-

ly as 1963 in *State v. White,* 153 So. 2d 401, 244 La. 585. (see page 408, col. 2 of 153 So. 2d.)

State v. Breedlove, 7 So. 2d 221, 199 La. 965 (1942) is persuasive here. In that case the defendant had been absent (though represented by counsel) *at a hearing on a motion to quash the indictment.* The Supreme Court avoided a reversal there on the ground that the defendant had *not yet been arraigned* at the time the motion to quash was heard. The Court conceded the correctness of the rule stated as follows in *State v. Layton,* 180 La. 1029, 158 So. 375:

"The jurisprudence of this state is settled to the effect that one who is tried for a felony must be personally present in court *at every important stage of the trial from the moment of his arraignment to his sentence.*" (Emphasis added.)

The clear implication of *Breedlove, supra,* is that *after arraignment* a defendant must be present on the hearing of such a preliminary motion, a motion to quash where evidence is taken.

The general rule prevailing throughout the country is thus stated in 14 American Jurisprudence, Sec. 189, page 898:

"A principal that prevades the entire law of criminal procedure is that *after an indictment is found, nothing shall be done except in the presence of the prisoner or his counsel, except in certain cases of*

misdemeanors." (Citing several cases. Emphasis added.)

Continuing in Sec. 190, page 899, same volume, the authors state:

"In capital cases, *and in fact in all charges of felony,* whether the defendant is in custody or on bail, *after indictment returned or information filed NOTHING MAY BE DONE by the court in the case* unless the accused is personally present. In a capital case, the rule holds good even after the accused has pleaded guilty . . ." (Emphasis added.)

The Federal requirement of the presence of the defendant at every stage of the case after indictment is well known and should require little documentation in this Court. See: *Evans v. United States,* 284 F. 2d 393, 94 ALR 2d 266; *Jones v. United States,* 299 F. 2d 661, cert. denied 371 U.S. 864, 83 S.Ct. 123, 9 L.Ed. 2d 101; *Crowe v. United States* 200 F.2d 526; *Glouser v. United States,* 296 F.2d 853, citing 23 CJS, Crim. Law, Sec. 973, cert. den. 82 S.Ct. 840, 369 U.S. 825, 7 L.Ed.2d 789.

Finally, *Pointer v. Texas,* 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065 (1965) settled the issue that right to counsel and right to be present at all phases of trial, guaranteed by the Sixth Amendment to the Federal Constitution, are rights which are binding upon the States and that denial of such rights is a denial of due process under the Fourteenth Amendment.

In view of all of the above, therefore this record fairly shouts the fact that these defendants did not receive anything resembling due process, they were simply "processed".

LONG HOURS, SLEEPING JURORS AND ILL AND EXHAUSTED COUNSEL.

Mr. Gill, counsel for defendants Skinner and Gueldner, was suffering from a severe case of diabetes and other ailments later described by his personal physician as making it physically impossible for him to work all night in trial. (Vol. 2, R. 338.)

Trial of the case had commenced at 10:30 a.m. and continued on, with the usual recesses until the State rested near midnight. Thereupon the following occurred: (Vol. 3, R. 604)

BY MR. DOLAN: The State at this time will rest its case, reserving the right to rebuttal.

BY MR. GILL: *Before asking for a recess.* I want to say this. I have done the best I could. I am absolutely, you might say mortally tired. We have ten, possibly twelve, witnesses to place on the witness stand. If Your Honor please, I am certainly not trying to put anything off. I have done the best I could. I'm mortally tired.

BY THE COURT: YOU HAVE BEEN AFTER ME ALL DAY, MR. GILL. I've gotten tired of listening to you. I am going to see if we can't finish this case

tonight. Go to work and see if we can't finish this case tonight.

BY MR. GILL: I'll do what Your Honor says.

BY THE COURT: I'M SURE EVERYONE IS TIRED, ETC.

Thereupon, after a brief exchange Mr. Gill informed the Court that he was suffering from a "severe case of diabetes" (R. 605) which was later amply borne out by medical testimony of his personal physician, Dr. Morrison, on hearing of the motion for new trial.

Thereupon the Court replied "I know you have been ill" and added that "we have been having continuances on top of continuances" but generously allowed this 65 year old, weary diabetic a *THREE MINUTE RECESS.* (R. 605.)

BY THE COURT: We will take a recess for three minutes.

BY MR. GILL: If Your Honor please I respectfully request Your Honor declare a mistrial.

BY THE COURT: Request for mistrial is denied.

BY MR. GILL: Respectfully object and reserve a bill of exceptions.

BY THE COURT: You may have your bill.

BY MR. GILL: Respectfully request a recess.

BY THE COURT: The Court will be at recess for *three minutes.*

After denying the request for a recess the first night *and the motion for a mistrial made upon such denial* (R. 605) the Court then kept the Court going till about *THREE O'CLOCK THE NEXT MORNING.* (R. 687.)

The jury was then ordered back for 9:30 a.m. that same morning at which time they heard arguments, received instructions and retired at 2:45 p.m.

On a motion for new trial, the excessively long hours were complained of and it was alleged that as a result: (a) Some of the jurors were asleep and (b) Due to his diabetic condition Mr. Gill was physically and mentally unable to perform in such round the clock fashion and still do justice to his clients.

Extensive evidence was heard on this motion (R. 255) including the testimony of the jurors, bystanders who saw two of them either sleeping or apparently asleep during trial and Mr. Gill's personal physican, Dr. Morrison who gave a detailed history of Mr. Gill's medical history during recent years, showing conclusively that, due to his diabetic condition and other ailments, it was physically impossible for him to perform as a trial counsel until 3 a.m. with any degree of mental alertness whatever. He also described the

resultant effects of this ordeal upon his patient after the trial, and how he was hospitalized and treated for weeks thereafter.

Mr. Gill also took the stand, testified to his physical condition when he first moved for a mistrial, and testified also to the fact that, the following day, during his own argument to the jury, he noticed one of the jurors nodding and apparently asleep. (R. 322 and 323.) He admitted that he probably should have moved for a mistrial then or called the Court's attention to the sleeping juror but he was in such poor physical condition that his judgment was not good and he did nothing. (R. 323.)

During the hearing of this motion the trial Judge argued with Mr. Gill as to whether or not any juror had been roused from sleep by a court attache, the Judge insisting that no such thing happened. (R. 323, 324.) However, after several witnesses testified that at least two of the negro jurors were either asleep or apparently sleeping, THE TRIAL JUDGE'S OWN CRIER, MR. MARCHESE, TESTIFIED THAT HE HAD DEFINITELY NOTED ONE NEGRO JUROR HAD HIS EYES CLOSED. (R. 349, 350.)

Mr. Gill's personal physician, Dr. Morrison, gave a detailed medical history of his patient and made perfectly clear that the ordeal of being made to try a case all day, straight through until 3 a.m. and then being made to return at 9:30 a.m. the same morning to continue trying a case made it impossible for Mr.

Gill to maintain any degree of efficiency whatever in his condition. Dr. Morrison stated that, after working beyond a twelve hour period his efficiency would be "almost nil". (Vol. 2, R. 338.) Dr. Morrison was intimately acquainted with Mr. Gill's physical history, having treated him for many years. He stated that his patient had been suffering from diabetes since 1951 or 1952. (Vol. 2, R. 339.) At the time of trial he had been suffering from an acidotic condition due to diabetes together with nervous exhaustion which had commenced about March 15, 1966 (six days before trial) and that when he examined Mr. Gill shortly after trial on March 26 he was complaining of feeling very fatigued and having pain over the region of the heart. He seemed to have a bloated appearance and had a blood sugar content which was abnormally high—about 240 as against a normal range of between 80 to 130. (Vol. 2, R. 338, 9.) Due to a shortage of beds in the hospital he couldn't hospitalize him immediately, despite efforts to do so at both Baptist Hospital and Touro. He treated Mr. Gill until March 31, when he finally got him into a hospital and he stayed in the hospital until April 12, stating: "It took that amount of time to get his diabetes under control", and he continued home treatment for the diabetes and other ailments discovered during the hospitalization period. (R. 339, 340.)

The State has previously responded to this objection to the all night session by suggesting below to the State Supreme Court:

(a) That Mr. Gill should have had a "standby" associate to help carry on the trial if he himself should become exhausted; and

(b) That Mr. Gill could not have been as exhausted as he claimed because, even after the all night session he was still able to make repeated objections and argue the case to the drowsy jury.

To the first suggestion, as to the necessity of having a "standby" associate, the short simple answer to this is that there was no reason to anticipate the necessity of such help. There was simply no reason why anyone should even consider in advance the possibility that the Court would choose to work virtually around the clock in a routine criminal case.

As to the second argument, we submit that the State's suggestion is patently ridiculous. Mr. Gill is a grizzled warrior of many battles. As long as he draws breath it is highly likely that he will continue expending it in noting an objection or reserving a bill. To many familiar with his prowess at the criminal bar in the by-ways and bayous of Louisiana, the better opinion would be that, when Brother Gill is being transported on his last journey to make his appearance before the Court of TRULY LAST RESORT, close listeners will doubtless be able to hear a thumping and a murmuring from within the coffin indicative that contained counsel still has something else to say.

And so it is ridiculous that urge that, simply because Mr. Gill was still able to get onto his feet and speak, that he was in any condition, physical or mental, to do justice to his clients. To the contrary, there is internal evidence that he was definitely "not himself" because:

(a) He overlooked calling a principal defense witness who would have testified that the car in which the marijuana was found did not belong to Mr. Skinner. (See details in application for second rehearing before State Supreme Court, Supplemental Appendix); and

(b) On the second day, after working all night, Mr. Gill was obviously wandering a bit when he *began to testify in his argument to the jury* and the Court stopped him over the State's objection. (Bill of Exception 28, Vol. 2, R. 247 through 251.)

In an earlier brief the State has also sought to suggest that the determination of the Court to work through the night was due to the fact that numerous continuances had been sought before. This is false for at least two reasons:

(a) First of all, we are not dealing here with another request for a *continuance*, but merely the problem of a normal recess and normal working hours; and

(b) Such continuances as had been granted were by no means unreasonable and were unopposed by the

State. Indeed, one such continuance was mandatory because the state, virtually on the eve of trial had amended the bill of information to show a different narcotics agent. When this was done a slight delay had to be granted.

Finally, as we have noted in earlier briefs to the State Supreme Court, the long hours of work with no rest took their toll not only of counsel and the drowsy jurors but of the able Court as well. As we have noted in great detail below the able trial Judge, an experienced criminal lawyer in his earlier days, made some mistakes which he would never have made had he been fresh, alert and at his shining judicial best. For example, he became confused and gave a charge on the full law of conspiracy although no conspiracy was charged in this case. There was a conspiracy charged in a separate proceeding, but not in the case at bar. It was this error which formed the basis of the reversal by the State Supreme Court on the original hearing. (See Supplemental Appendix.)

Moreover, as we have also noted in earlier briefs, he made several clear cut errors on his evidentiary rulings, in one of which he got hold of the wrong end of the best evidence rule and came up with a "reverse English" result.

THE CONSPIRACY CHARGE.

The State Supreme Court, in its original hearing below, reversed the conviction by a vote of 6-1, solely

on the grounds that the conspiracy charge was erroneous here. This point is fully developed by the original opinion of the State Supreme Court herein and we rely upon same, along with Justice Hamiter who still adheres to it. For the sake of emphasis, however, and because we believe that the first two points developed above are of greater national interest, we will not elaborate upon the original State Court opinion.

CONCLUSION.

There are many errors complained of below but we feel that the first two developed herein are most appropriate to our petition for relief at the hands of our highest Court. Certainly, when this Court is and has been struggling so valiantly to demand some reasonable facsimile of due process in State Courts, what we ask here is a basic minimum. What we ask is simply that:

(a) When there are three defendants jointly charged in a serious criminal offense, the State should not be permitted to try part of the case, in vital pretrial evidentiary hearings, without notifying one defendant or his counsel as to what is going on, particularly while that defendant is helpless in jail; and

(b) No matter how fashionable fast moving dockets may be these days, common sense demands a recognition that justice is administered by men and not machines and some consideration must be made

for human weariness, caused by ridiculous all night sessions provoked by a Judge who simply wanted to keep his docket moving at assembly line pace. This trial was a travesty of justice, for more reasons than one. Many other errors, strenuously presented below in a series of five briefs to the State Supreme Court, cannot for obvious reasons, be covered here. The net result was a mockery of justice and the bitter joke is upon this indigent Charbonnet who got fifty years without even having a chance to hear all of what was going on. In sum, the casual reader might plausibly conclude: "If this is due process, I'll take Russian Roulette."

For all of the foregoing reason, we respectfully submit that the judgment below should be reversed as to all defendants and a new trial order.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, G. Wray Gill, of counsel for petitioners and a member in good standing of the bar of the Supreme Court of the United States hereby certify that a copy of the foregoing brief for petitioners has been served upon opposite counsel, the Attorney General of Louisiana and the District Attorney for the Parish of Orleans, by mailing same, postage prepaid and properly addressed to their respective offices on July ..., 1968.

G. WRAY GILL.